

*Courtesy Copy*

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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IN RE: JOHN DOE,

CV 98-1101

:  
United States Courthouse  
Brooklyn, New York,

:  
July 20, 2010  
- - - - - X 10:30 o'clock a.m.

TRANSCRIPT OF ORAL ARGUMENT  
BEFORE THE HONORABLE I. LEO GLASSER  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: MORGAN LEWIS & BOCKIUS, LLP  
101 Park Avenue  
New York, N. Y.  
BY: KELLY MOORE, ESQ.  
LESLIE R. CALDWELL, ESQ.  
DAVID A. SNIDER, ESQ.  
BRIAN A. HERMAN, ESQ.

For the Defendant: WILSON ELSEER MOSKOWITZ EDELMAN  
& DICKER, LLP  
150 East 42nd Street  
New York, N. Y. 10017  
BY: RICHARD LERNER, ESQ.  
LAUREN J. ROCKLIN, ESQ.

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1 Proceedings recorded by mechanical stenography, transcript  
2 produced by computer.

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THE CLERK: Criminal cause for oral arguments, '98 CR  
1101, United States versus John Doe.

State your names for the record.

MS. MOORE: Kelly Moore, Leslie Caldwell, Brian  
Herman and David Snider for John Doe.

MS. LERNER: Richard Lerner of Wilson, Elser,  
Moskowitz, Edelman & Dicker for respondent Frederick M.  
Oberlander.

MS. MOORE: Your Honor, with respect to the relief we  
seek, we rely on our brief, the arguments contained therein  
and the authority contained therein.

Specifically Judge Jones' decision in the Visa case  
and Judge Weinstein's decision in the Zyprexa case.

If anything, the facts of this case are more  
compelling than those cases. Visa and Zyprexa involved sealed  
documents in civil litigation, which involved possible  
commercial or economic harm to a business entity.

This case, as the Court is aware, involves potential  
physical harm or death to an individual. With respect to the

1 First Amendment arguments, at the last court appearance the  
2 Court did not ask us to specifically address that in our  
3 briefs. We would like the opportunity to supplement our brief  
4 with more detailed First Amendment analysis if that is okay  
5 with the Court.

6 In the meantime, I would just note that the first  
7 amendment is not absolute. The facts of this case in no way  
8 support the conduct of the respondent and the respondent's  
9 First Amendment protection. The respondents are not the  
10 media, they are not a news gathering organization seeking to  
11 write articles and publish them.

12 Mr. Oberlander is an attorney. As such, he has  
13 additional ethical obligations to not disseminate or use  
14 information that is secret, private and confidential, that  
15 comes into his possession.

16 Moreover, in this case, the documents at issue were  
17 clearly stolen and Mr. Oberlander, who represented the thief,  
18 knew that they were stolen.

19 As the agent of a thief, receiving those stolen  
20 documents, he doesn't deserve any greater protection-- First  
21 Amendment protection-- than the thief himself would.

22 Additionally, the respondent knew that some of the  
23 documents were sealed, as is clearly evident from paragraph 95  
24 of the complaint in the Southern District.

25 As an attorney, once again, Mr. Oberlander knew what

1 that meant. He knew that documents don't seal themselves, they  
2 are sealed only pursuant to court order. And there are also  
3 unsealed only pursuant to court order.

4 He was also aware of the Southern District electronic  
5 filing rules, which compelled him to exercise caution and care  
6 with respect to disseminating information about cooperators.  
7 That rule applies to all cooperators, even those who testify  
8 publicly. In this case the cooperation and the cooperation  
9 agreement were sealed. Mr. Oberlander certainly should have  
10 exercised greater care.

11 The intended use of it in this case doesn't support  
12 compelling First Amendment interest. I don't know if the Court  
13 had the opportunity to review the Southern District Civil RICO  
14 complaint. But the information about my client's criminal case  
15 in no way supports any claims contained in that case, and it's  
16 clearly being used to harass, embarrass, intimidate and coerce  
17 my client.

18 Finally, as I mentioned before, this case unlike any  
19 of the cases cited by the respondents involving potential  
20 danger to human life. Under the facts of this case the First  
21 Amendment simply possess no bar to the imposition of the  
22 relief we're seeking.

23 With respect to Mr. Oberlander's declaration filed  
24 last Friday, I would note that the respondents throughout this  
25 proceeding have engaged in a number of dubious litigation

1 tactics, that are arranged in an intentional misinterpretation  
2 of the Court's order, without seeking clarification along the  
3 lines of claiming that they didn't know. He contacted Mr.  
4 Bernstein for an affidavit that said they didn't know the  
5 lawyers could review the documents in question in connection  
6 with representing the clients.

7           And a previous meritless allegation of misconduct  
8 against me. It was withdrawn, but nevertheless made and it  
9 was intended clearly to get me to do something that would have  
10 been unethical, to put my own interests ahead of my client's  
11 by accepting a settlement that wouldn't have been favorable to  
12 my client, just to get the unpleasant allegations against  
13 myself withdrawn.

14           The declaration of Mr. Oberlander, in which he  
15 accuses this Court of unconstitutional conduct and makes  
16 application for recusal, is clearly in the same vain of that  
17 litigation at that particular time. It is clearly intended to  
18 get the Court to do one of two things: To either recuse  
19 itself on the basis of a completely meritless application or  
20 in the alternatively to get the Court to pull its punches, to  
21 bend over backwards, to demonstrate a lack of bias, to issue a  
22 ruling that would be favorable to the respondents than if they  
23 had not made such a meritless unsupported application.

24           Those litigation tactics should be seen for what they  
25 are and respondents and litigants engaging in them should not

1 be rewarded.

2 I thought long and hard about responding to some of  
3 the other allegations and arguments contained in this  
4 Oberlander declaration, the allegation that this Court has no  
5 decency, that somehow it is beyond the authority of a federal  
6 judge, upon application of United States Attorney's office, to  
7 seal documents or files when doing so is in the interest of  
8 protecting human life or national security, or that somehow  
9 has a greater First Amendment right to put a man's life in  
10 danger by publishing stolen and sealed confidential documents  
11 then if he walked into a crowded theatre and shouted fire.

12 In rereading Mr. Oberlander's declaration, however, I  
13 was reminded of a comment that a former colleague of mine used  
14 to make from time to time, which is that there really is no  
15 percentage in arguing with crazy people, and so upon the  
16 advise of another wise man I once got, I think, I will let  
17 discretion be the greater part of valor and not dignify that  
18 declaration or the rants contained therein with a response.

19 If the Court has no additional questions for us, we  
20 will rest on our papers, but we would like to supplement them  
21 with an additional First amendment analysis.

22 THE COURT: I will come back to you.

23 Let me hear from Mr. Lerner.

24 MS. LERNER: Your Honor has now had an opportunity to  
25 read the case law --

1           THE COURT: Before we get to that, I am not  
2 altogether clear as to what Mr. Oberlander's notice of appeal  
3 is all about. I do not quite understand what is it.

4           MS. LERNER: It's a protective notice of appeal. He  
5 reserve his right to argue. There is yet to be a formal  
6 permanent injunction or that a TRO -- there is possibly a gap  
7 period where it could be argued that the TRO lapsed and became  
8 a permanent injunction. It's merely protective.

9           THE COURT: What does that mean, a protective notice  
10 of appeal?

11          MS. LERNER: If the TRO could be deemed converted to  
12 a permanent injunction, we will appeal from that.

13          THE COURT: Is not that kind of premature? Is there  
14 anything that prevents him from filing a notice of appeal when  
15 that event occurs?

16          MS. LERNER: If a permanent injunction is issued we  
17 shall file a further notice of appeal.

18          THE COURT: What's the purpose of a protective notice  
19 of appeal? Is that to preserve some limitation period?

20          MS. LERNER: Frankly, your Honor, the case law --

21          THE COURT: To be perfectly candid --

22          MS. LERNER: Candidly the TRO itself is appealable  
23 because it restrains Mr. Oberlander's free speech rights.

24          THE COURT: Then he could file a notice of appeal  
25 with respect to what he believes is an order, which is

1 properly appealable.

2 MS. LERNER: Yes.

3 THE COURT: I don't understand what a protective  
4 notice of appeal is. I'm frank to say, I have never  
5 encountered it before.

6 It may be that my knowledge of this process is a  
7 little wanting, but I do not understand what it is.

8 MS. LERNER: First of all, on June 21st your Honor  
9 stated that there was a permanent injunction vis-a-vis the PSR  
10 and ordered it returned. That is appealable. The notice of  
11 appeal refers to that.

12 But since your Honor stated further evidence would be  
13 taken after it was stated that it's our position it could  
14 fairly be argued that the Court did not actually render a  
15 final determination as to that document. If it did --

16 THE COURT: The reason I am asking, Mr. Lerner, is  
17 that it is very clearly established law that it may be that a  
18 filing of a notice of appeal deprives this Court of  
19 jurisdiction with respect to continuing in a matter.

20 I do not know whether a notice of appeal, if filed,  
21 would have that effect here with respect to injunctive  
22 relief. I think that is something that is questionable.

23 But, in any event, it was that issue which caused me  
24 to wonder what is this document about, is it in some way  
25 affecting my continuing exercise of jurisdiction in this



1 Your Honor, sealing the court file, I submit, was  
2 unconstitutional in this case, because there is no signed  
3 court order.

4 Hartford says there must be a court order. If your  
5 Honor did sign an order, there is nothing in the docket sheet,  
6 as far as we can tell, to indicate that prior notice appearing  
7 was given prior to the sealing of the court file.

8 We have not had an opportunity to see that docket  
9 sheet, therefore, we cannot note whether this case was  
10 properly sealed. If notice was given --

11 THE COURT: Excuse me.

12 If you went to the docket you would find that this  
13 case is under seal, correct?

14 MS. LERNER: Yes.

15 THE COURT: And in order to obtain documents, which  
16 are part and parcel of that case, you would have to make an  
17 application to a court to unseal that file. That is what the  
18 sealing order says.

19 MS. LERNER: And if the sealing order was not signed  
20 by your Honor and the requisite findings were not made, is  
21 unconstitutional, and we have been deprived of the opportunity  
22 to see the docket sheet and the United States Supreme Court in  
23 Amidao held we cannot presume what is in the docket sheet if  
24 we can't see it. If notice was given, we can't know that  
25 because the Court has declined to allow us to see the docket

1 sheet as stated in Hartford. We cannot make any presumption  
2 about what it says. The appellate court can make no  
3 presumption and we cannot. Therefore, we cannot presume the  
4 documents were properly sealed, your Honor.

5 There was nothing on the record that the sealing --

6 THE COURT: Excuse me. Just a minute. Is there some  
7 presumption that an order -- assuming that there is an order  
8 and you do not know whether the order was or was not signed --  
9 what you do know by looking at the docket sheet is that this  
10 is a sealed file, sealed by order of the court.

11 Is there some presumption that the order is invalid  
12 because it was not signed, is that what I'm hearing?

13 MS. LERNER: I'm referring to the Hartford case--

14 THE COURT: Mr. Lerner, I am asking you what I am  
15 understanding, is there is a presumption of the invalidity of  
16 an order?

17 MS. LERNER: I think, your Honor stated on the record  
18 that this is just matter of factly and indicated as I recall  
19 it wasn't even signed, it's docket said is sealed. If there  
20 is a signed order, let us see it, because without a signed  
21 order this proceeding is unconstitutional.

22 THE COURT: It may be, Mr. Lerner, that you are  
23 correct. You are not answering the question.

24 MS. LERNER: I don't have to make any presumption.  
25 The United States Supreme Court has held the appellate courts

1 do not have to presume there is a signed order in the file  
2 when there is--

3 THE COURT: If there is an order or docket entry that  
4 says this has been sealed by order of the court, any person is  
5 free to ignore that order and if by some chance, some document  
6 in that file becomes available to any person, that person is  
7 free to assume that the order has no efficacy?

8 MS. LERNER: First of all, the docket here is sealed,  
9 therefore, Mr. Oberlander could not see any order in the file  
10 and the answer to your question is, yes, anybody may do it,  
11 whatever he wants with that document. It is free to be  
12 distributed, if it's a public of interest, criminal proceeding  
13 are per se of public interest.

14 THE COURT: It's true that criminal proceeding are a  
15 matter of public interest.

16 Doesn't follow that every document that has been  
17 created in the course of a criminal proceeding is a matter of  
18 public interest available to the public upon request.

19 That is particularly true, as I'm sure you know --  
20 Mr. Lerner --

21 MS. LERNER: I apologize for that interruption.

22 THE COURT: I understand your passion in connection  
23 with this matter.

24 Let us talk one at a time. Okay.

25 I take it you read Charmer Industries.

1 MS. LERNER: Yes.

2 THE COURT: And I take it that having read Charmer  
3 Industries, you would agree that a presentence report is a  
4 document which has some very specific confidentiality  
5 concerns.

6 MS. LERNER: Your Honor, of course, I agree with  
7 that. But the premise, you have asked whether a document  
8 could be used for any purpose -- if it's from a criminal  
9 trial -- criminal proceeding even if it's sealed, the question  
10 is was it stolen from the court file. Was it stolen or  
11 inappropriately unauthorized taken from the Court file as in  
12 Charmer?

13 The answer is, the Court can order its return. If  
14 it's obtained from other means, your Honor, has no  
15 jurisdiction to stop it. You can not issue a prior restraint  
16 order.

17 If I may continue?

18 THE COURT: Please.

19 MS. LERNER: There is nothing in the record, that we  
20 are aware of, because we cannot see the docket sheet or the  
21 sealing order. There is nothing on the order finding a more  
22 fundamental interest in the First Amendment would be served by  
23 sealing this court file. There is nothing on the record  
24 finding this was the least restrictive alternative.

25 Your Honor, granting -- now we turn to the TRO

1 itself, as the Court granted a TRO, which constitutes a prior  
2 restraint on speech without conducting any inquiry as to  
3 whether the respondent's First Amendment rights would be  
4 infringed.

5 Now, your Honor, ordered -- the order itself signed  
6 by your Honor incorporates Ms. Moore's arguments and it says  
7 for the reasons stated, but that is constitutionally  
8 insufficient according to Amadao, you must make independent  
9 findings to support a prior restraint.

10 It must be the order itself. The TRO is a nullity.  
11 Failing to make the requisite findings in the order to show  
12 cause, in as much it constitutes a prior restraint, renders  
13 that prior restraint unconstitutional.

14 Your Honor failed to disclose to us on the docket  
15 sheet that we requested, we cannot know whether these  
16 documents are properly sealed --

17 THE COURT: Have you made application to the Court?

18 MS. LERNER: We requested it.

19 THE COURT: Have you made application to me to unseal  
20 whatever document you wanted? That docket sheet indicated  
21 there were, I think, four or five numbered dockets -- docket  
22 entries which were sealed which were unsealed and, I think,  
23 made available to you.

24 MS. LERNER: They were not. They were not. Having a  
25 dual docket sheet, your Honor stated at the second appearance

1 that there were thirteen items on the docket sheet and six  
2 were sealed.

3 Your Honor, that is improper.

4 THE COURT: What was improper?

5 MS. LERNER: Your Honor, you sealed the entire  
6 docket, yet you indicated there are thirteen items in the  
7 docket, six of which are sealed, which means there are others  
8 which are not sealed and yet the entire file has been sealed.

9 Your Honor, if the Court goes beyond the relief  
10 sought in the order to show cause there will be a further  
11 violation of Mr. Oberlander's constitutional rights for the  
12 order to show cause did not seek permanent injunction, did not  
13 seek a gag order, there is no basis for such leave. He cannot  
14 be gagged.

15 He returned, your honor, the original document that  
16 he obtained from Mr. Bernstein.

17 Now, it may not be so clear in the record that he --  
18 those were actually the originals obtained from Mr.  
19 Bernstein. If the Court would like a representation from Mr.  
20 Oberlander to that effect, I would ask that he give it. But  
21 those were the originals.

22 Your Honor can do nothing to stop the dissemination  
23 of photocopies or electronic copies and the selective  
24 enforcement or selective gag order directed only at Mr.  
25 Oberlander and not, for example, Business Week, which as we

1 noted in our papers, has on its website an article which  
2 states that it has a copy of the criminal -- the sealed  
3 criminal complaint in this matter.

4 Your Honor, cannot selectively enforce a gag order  
5 against Mr. Oberlander. You cannot gag him and not gag  
6 Business Week.

7 If you're going to take on a little guy you have to  
8 take on a big guy. He'll not sit here and accept that, neither  
9 will I. We will fight this to the end. A permanent  
10 injunction cannot be granted.

11 Thank you, your Honor.

12 THE COURT: Do you want to respond?

13 MS. MOORE: Yes, your Honor.

14 I would note we'd like to sort of supplement our  
15 brief with an additional Fifth Amendment analysis.

16 THE COURT: Your application is granted to file a  
17 supplemental brief.

18 There are a number of things, which are troublesome  
19 in this case. Going back to the original order to show cause,  
20 that document was troublesome because it just said that there  
21 was a significant breach in the processes of this Court with  
22 respect to criminal dockets.

23 There was, as I think, indicated on that occasion, I  
24 was very concerned about the integrity of the record of this  
25 Court and that file. It turns out that the first document on

1 that docket sheet is a notification by an assistant United  
2 States attorney of the filing of an information, which  
3 eventually evolved into an indictment.

4           There is no indication, that is docket number one,  
5 which I obtained or had the clerk obtain from Kansas City or  
6 wherever these files are shipped, because it was no longer  
7 available in the courthouse. There is not any indication in  
8 that document or in a subsequent document that an application  
9 was made or request was made in that document to seal that  
10 file. Nor have I been able to find any order signed by me,  
11 which directed that this file be sealed.

12           Criminal cases such as the John Doe case and cases in  
13 which by virtue of cooperation agreements and variety of other  
14 matters either national interest, security interest, or  
15 significant interest that one may have in his own safety,  
16 which may be at risk. Criminal files are sealed where that is  
17 a significant consideration.

18           Let us assume for the moment that an order was signed  
19 by me somewhere along the line, as it may have been, directing  
20 that the file in this case be sealed. That order is directed  
21 to whom? Who is bound by it? That order, it would appear, is  
22 directed to the clerk of the court who is informed that this  
23 document or this file is sealed and is not to be made  
24 available, except upon an order of the Court unsealing it.

25           When the order to show cause was first brought into



1 this Court, it was a very serious concern as to whether  
2 somebody in this courthouse unsealed that file or made  
3 document which were sealed available to third parties. That  
4 was a very significant concern.

5 A hearing, which we held some weeks ago, makes it  
6 plain and, I think, it is beyond dispute that these documents  
7 were not removed by John Doe, he properly had them. The  
8 cooperation agreement was a document which was in the  
9 possession of his then attorney. His attorney had a perfect  
10 right, as did John Doe, to have a copy of that cooperation  
11 agreement, had a perfect right to have whatever document  
12 pertained to his case, which may have been part of the file.

13 Assume that John Doe decided to make the cooperation  
14 agreement, the proffer agreement available to a third-party,  
15 would an order have been violated? The answer is clearly,  
16 no. John Doe had these documents, so the testimony has thus  
17 far revealed, Mr. Bernstein has not submitted an affidavit nor  
18 has he testified. You cannot find him for the purpose of  
19 serving the subpoena.

20 What we have on the record is the testimony by John  
21 Doe that he did not give those documents to Mr. Bernstein,  
22 which gives rise to the legitimate inference that Mr.  
23 Bernstein may have stolen them, may have improperly obtained  
24 those documents.

25 What order of the Court was violated by that event?

1 Those documents then came into the hands of Mr. Oberlander.  
2 Mr. Oberlander knew that those documents were sealed  
3 documents, contained very, very serious information and his  
4 assertion or testimony that, well, it wasn't his words, it was  
5 his client's words, is remarkable for it's disingenuous. To  
6 say that I am not a criminal lawyer and I don't know what it  
7 meant, I have a sealed document, is preposterous.  
8 Particularly, since he had the electronic filing information  
9 from the Southern District that said if it's a cooperation  
10 agreement, be very, very careful before you use it.

11 Now, what happened, assuming that the documents were  
12 in John Doe's cabinet or in his desk, as they had a perfect  
13 right to be, they were his documents, and the documents were  
14 then wrongfully taken by Mr. Bernstein. Mr. Bernstein is a  
15 converter, Mr. Bernstein has no title to those documents, no  
16 legal right to those documents, to that tangible document  
17 whether it would be a piece of paper, whether it be a gold  
18 ring or whatever it is, it was a tangible item which was  
19 converted, given the testimony that I have by Mr. Bernstein --

20 MS. LERNER: John Doe, I believe. Bernstein did not  
21 testify.

22 THE COURT: I am saying based on the testimony. Mr.  
23 Bernstein then analogizing these events to the fundamental  
24 principle of conversion, or larceny, if you will, past it onto  
25 Mr. Oberlander.

1           Mr. Oberlander had no better right to those documents  
2 than Mr. Bernstein had. If we were to describe this change of  
3 events in terms of property rights, title, Mr. Bernstein had  
4 no title and he had no title to give to Mr. Oberlander.

5           Mr. Oberlander even if he were an innocent purchaser  
6 for value, would not have acquired title to those documents,  
7 because Mr. Bernstein had no title to give him. If requests  
8 were made of Mr. Oberlander to return those documents and Mr.  
9 Oberlander refused, it may be that an action for conversion  
10 may be available against Mr. Oberlander.

11           It may be that there is some disciplinary rule, which  
12 might be applicable to Mr. Oberlander, who had documents which  
13 he knew or perhaps should have known may have been improperly  
14 obtained by Bernstein and passed onto him.

15           It may be that there is some ethical principle, which  
16 should have precluded Mr. Oberlander from using those  
17 documents. Because the sensitivity of those documents would  
18 have been apparent to any reasonable person, particularly one  
19 who is trained in the law ostensibly.

20           So the question is, yes, something bad was done,  
21 something very bad and perhaps despicable was done by the use  
22 of those documents annexed to a complaint in the Southern  
23 District, in a civil case, but the question is what order was  
24 violated?

25           You can certainly submit briefs on the First

1 Amendment issue. I have some question about whether the First  
2 Amendment is applicable here. There was an opinion by Judge  
3 Kahn in the Western District-- I did not bring my file down. I  
4 thought this was on for 11:30. What is the name of the  
5 town -- I will be more than happy to give it to you.

6 LAW CLERK: It was a Northern district case.

7 THE COURT: Yes, it was by Judge Kahn, in which he  
8 has a very interesting discussion in a case, which is not  
9 this, but analogous in the sense that it involved a  
10 confidentiality order that was part of a potential settlement  
11 stipulation and that the documents in that confidentiality  
12 agreement became available or was sought to be made available  
13 to a newspaper upstate by the reporter of that newspaper and  
14 the First Amendment argument was made in that case as well.

15 Judge Kahn didn't think it was applicable for a  
16 variety of reasons. I think, his reasoning might be quite  
17 persuasive when dealing with a presentence report and  
18 certainly Charmer, I think, leaves very little doubt that a  
19 presentence report has a very, very special status. So there  
20 we are.

21 You want an opportunity to submit the supplemental  
22 brief and I will give you that opportunity. I just received  
23 Mr. Lerner's document this morning. It was FAX'D or ECF'd at  
24 four something last night. You don't request an adjournment at  
25 4:00 o'clock on the eve of a hearing. If you look at my local

1 rules it require 48 hours notice for purposes of adjourning a  
2 schedule hearing or a conference.

3 So I didn't get around to reading it because I left  
4 before that document arrived and I looked at it this morning.

5 Ms. Moore called, I think, shortly after that  
6 document was received, so my law clerk tells me, and asked for  
7 an adjournment to respond to that letter. I was not able to  
8 respond to that because I was not here. But I did call her  
9 this morning and I asked her if she wanted to adjourn. You  
10 indicated that you saw no purpose for this conference as well,  
11 but she preferred to go ahead and make application for a  
12 supplemental brief.

13 What I have just declared is not to be understood at  
14 this moment as a determination that injunctive relief may not  
15 be appropriate, but I am troubled by the issues as I have  
16 outlined them as to whether an order signed by a judge on one  
17 of those sealing envelopes, which says, not to be unsealed  
18 except by order of the Court, is binding upon any third-party  
19 person, is binding or is the procedure, which is intended by  
20 that procedure, which informs any third-party who has notice  
21 or will have notice by looking at a docket sheet, looking at  
22 the ECF, this is a case under seal -- under sealed or filed  
23 under seal-- make application to the Court to unseal the  
24 document.

25 Whether having knowledge that the case was one, which

1 has been filed under seal, whether an order was issued or not,  
2 it is a case which is filed under seal, and clearly indicates  
3 the content of that sealed file is not to be disclosed, except  
4 upon order of the Court, whether that can be ignored, whether  
5 that is presumptively meaningless and has no binding effect  
6 upon anybody.

7           It is an interesting question, Mr. Lerner. Judge  
8 Kennedy who I think you were quoting with all due respect, may  
9 not have faced this specific issue at any given time, but it  
10 is obviously an issue which is quite troublesome. It is quite  
11 troublesome in so far as Mr. Oberlander's use of that  
12 document, which he knew was sealed, knew contained very  
13 sensitive information. It may be some other relief may be  
14 available against Mr. Oberlander. I am not sure.

15           In so far as injunctions are concerned, there is an  
16 interesting observation in Charmer as well, if you read it  
17 carefully, Mr. Lerner, and I'm sure that you have. Normally  
18 was is required, and Ms. Moore indicates what is normally  
19 required before injunctive relief is obtained-- and by the way  
20 in so far as the TRO is concerned-- I do not recall there was  
21 any objection ever raised by you to the issuance of the TRO.

22           It is my sense that you were consenting to it at  
23 every stage of the TRO as it was initially issued and renewed.  
24 We will leave that go for the moment.

25           MS. LERNER: I can respond --

1 THE COURT: I said, leave that go for the moment.  
2 But normally, before a TRO-- injunctive relief, more  
3 specifically should be issued, there are three prerequisites.  
4 The leading case in this circuit is Jackson Dairy versus H.B.  
5 Hood, I think, it is 570 2d or thereabouts. You have to show  
6 irreparable alarm, likelihood of irreparable harm, likelihood  
7 of success on the merits, or reasonable issues going to the  
8 merits with the balance of hardships tipping in favor of the  
9 movant.

10 In Charmer, you may recall-- it may be Judge Kearse  
11 who said that the burden should not be on the person seeking  
12 the injunctive relief, where the presentence report is the  
13 document at issue, the burden should be upon the Attorney  
14 General, the person who has that presentence report to  
15 establish an overriding need for the use or possession of that  
16 document.

17 The burden should be on the other side, not on the  
18 movant, but the person seeking to be enjoined.

19 Having said all of that I will await further  
20 briefing. I do not think there is anything further that you  
21 want to submit, Mr. Lerner.

22 MS. LERNER: There are two cases I would like to cite  
23 and just --

24 THE COURT: Why don't you submit them to me.

25 MS. LERNER: I don't have copies for --

1 THE COURT: When I say submit them, submit the  
2 citations to them.

3 MR. LERNER: DiPietro against the United States of  
4 America.

5 THE COURT: I'm sorry --

6 MS. LERNER: D I P I E T R O.

7 It is a Lexus cite, 2009, U.S. District --

8 THE COURT: What are the names of the parties?

9 MS. LERNER: DiPietro against the United States of  
10 America.

11 THE COURT: DiPietro is the plaintiff?

12 MS. LERNER: Petitioner for the unsealing of the  
13 Court file. 2009, US District, Lexus 30010.

14 THE COURT: What court was it.

15 MS. LERNER: Southern District.

16 And the second case is Nycomeds against Glen Parker  
17 Generics, 2110 U.S. District, Lexus 20788.

18 It is a magistrate decision , Eastern District of New  
19 York, Magistrate Mann.

20 THE COURT: You want a week?

21 MS. MOORE: Yes, your Honor.

22 THE COURT: You are responding to Mr. Lerner's last  
23 submission and I don't think any further submissions are  
24 necessary.

25 MS. MOORE: Your Honor, in light of Mr. Lerner's last



1 submission, I would seek clarification with respect to the PSR  
2 that it's clear --

3 THE COURT: Before you get to that. Am I correct  
4 that the documents, at least Mr. Lerner's last submission says  
5 this whole proceeding now is moot because the documents have  
6 been surrendered, turned over to you, is that correct?

7 MS. MOORE: Not that I know of. I think, as I  
8 understand his position, which I don't agree with, he's  
9 entitled to keep all copies of the documents, as long as he  
10 returned the originals, so, I believe, in his letter he states  
11 that if at the court proceeding he marked as exhibits the  
12 original versions of those documents, but his client has  
13 maintained both electronic and hard copies, so clearly the  
14 intent was not to give back, as Judge Jones ordered in Visa,  
15 all copies as well. It doesn't get the originals back and are  
16 free to disseminating copies.

17 THE COURT: I think, I indicated Mr. Oberlander  
18 should not do that. I think it was in the form of an order and  
19 that order, I believe, if I have not done so, I am doing it  
20 now and if you want it in writing until I resolve this issue.

21 MR. LERNER: You are issuing a further TRO?

22 THE COURT: Yes, I am.

23 I'm issuing a further TRO for the reasons that I have  
24 indicated.

25 I think there is irreparable harm, which is imminent

1 to Mr. John Doe, those documents contained information which  
2 is highly, highly sensitive and if disseminated it is  
3 discriminatively to a person that should not get the  
4 information.

5 I think, it would put Mr. John Doe's safety at risk.  
6 The likelihood of success is or is not present. Again, if  
7 Charmer Industries is being read correctly by me and, I think,  
8 it is, I think, the burden with respect to whether or not  
9 there is some need to maintain those documents or to keep them  
10 should be shifted to you. Until next week, okay.

11 I do not think we need any further hearing. You will  
12 submit the briefs and I will make my determination. The TRO is  
13 continued for another ten days.

14 Is there anything further?

15 MS. MOORE: No, your Honor.

16 THE COURT: Thank you.

17 MS. MOORE: I do have one last application. With  
18 respect to the transcript to have my client's name replaced  
19 with John Doe.

20 THE COURT: Yes.

21 MS. MOORE: Thank you.

22 \*\*\*\*\*

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